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In the Supreme Court of the United States

OCTOBER TERM, 1966

No. 703

FRED MEYER, INC., ET AL., PETITIONERS

v.

FEDERAL TRADE COMMISSION

BRIEF FOR THE FEDERAL TRADE COMMISSION IN OPPOSITION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 3a–32a) is reported at 359 F. 2d 351. The opinion of the Federal Trade Commission (R. 59–142)[1] is not yet reported.

JURISDICTION

The judgment of the court of appeals was entered on July 1, 1966 (Pet. App. 33a–36a). The time within which to file a petition for a writ of certiorari was extended by Mr. Justice Douglas until October 21, 1966, and the petition was filed on October 19, 1966. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

[1] "R." refers to the two-volume transcript of record in the court of appeals, on file with the Clerk of this Court.

QUESTIONS PRESENTED

The Federal Trade Commission held that petitioner Fred Meyer, Inc., violated Section 2(f) of the Clayton Act (as amended by the Robinson-Patman Act) and Section 5 of the Federal Trade Commission Act upon finding that petitioner knew or should have known that the price concessions and promotional allowances it induced and received from its suppliers were unlawful under Sections 2(a) and 2(d) of the Robinson-Patman Act, respectively. The questions presented are—

(1) Whether the Commission's findings that petitioner knew or should have known that the concessions and allowances it received were unlawful are supported by substantial evidence, as held by the court below.

(2) Whether that part of the cease-and-desist order pertaining to the Section 2(d) violation, as modified by the court below, is properly grounded on and reflective of the Commission's findings.

STATUTES INVOLVED

Section 2 of the Clayton Act, as amended by the Robinson-Patman Act, 49 Stat. 1526, 15 U.S.C. 13, provides in pertinent part as follows:

> (a) It shall be unlawful for any person engaged in commerce, in the course of such commerce, either directly or indirectly, to discriminate in price between different purchasers of commodities of like grade and quality * * * where the effect of such discrimination may be substantially to lessen competition or tend to create a monopoly in any line of commerce, or to injure, destroy, or prevent competition with any person who either grants or knowingly re-

ceives the benefit of such discrimination, or with customers of either of them: *Provided*, That nothing herein contained shall prevent differentials which make only due allowance for differences in the cost of manufacture, sale, or delivery resulting from the differing methods or quantities in which such commodities are to such purchasers sold or delivered * * *.

* * * * *

(d) It shall be unlawful for any person engaged in commerce to pay or contract for the payment of anything of value to or for the benefit of a customer of such person in the course of such commerce as compensation or in consideration for any services or facilities furnished by or through such customer in connection with the processing, handling, sale, or offering for sale of any products or commodities manufactured, sold, or offered for sale by such person, unless such payment or consideration is available on proportionally equal terms to all other customers competing in the distribution of such products or commodities.

* * * * *

(f) It shall be unlawful for any person engaged in commerce, in the course of such commerce, knowingly to induce or receive a discrimination in price which is prohibited by this section.

Section 5(a) of the Federal Trade Commission Act, as amended by 66 Stat. 632, 15 U.S.C. 45(a), provides in part as follows:

(1) Unfair methods of competition in commerce, and unfair or deceptive acts or practices in commerce, are hereby declared unlawful.

* * * * *

(6) The Commission is hereby empowered and directed to prevent persons, partnerships, or corporations * * * from using unfair methods of competition in commerce and unfair or deceptive acts or practices in commerce.

STATEMENT

After extensive proceedings, the Federal Trade Commission found that petitioner Fred Meyer, Inc., and two of its officers (1) violated Section 2(f) of the Clayton Act, as amended by the Robinson-Patman Act, by knowingly inducing certain suppliers of Meyer to grant it discriminatory prices illegal under Section 2(a) of the Act, and (2) violated Section 5 of the Federal Trade Commission Act by knowingly inducing certain suppliers to grant Meyer promotional allowances illegal under Section 2(d) of the Clayton Act; and entered a cease-and-desist order.

Meyer (hereinafter "petitioner") operates a chain of thirteen retail stores in the Portland, Oregon, area selling groceries, drugs, variety items, and a limited line of clothing. With sales exceeding $40 million in 1957, it was, during the relevant period, the second largest seller of all goods in the area (Pet. App. 3a; R. 60).

Since 1936 petitioner has conducted, through the use of coupon books, a promotional advertising campaign for one month of each year. For each promotion, it prints and distributes a 72-page book, each page of which features a single product and serves as a coupon for the purchase of certain amounts of such product at a specially reduced rate. The campaign involves a large promotion; about 140,000 books

were used in 1957, and about 120,000 in 1958 (Pet. App. 4a; R. 62–64). Petitioner finances the promotion by charging the supplier of each featured product a basic fee of $350. In addition, some of these suppliers give petitioner price reductions based upon volume purchases, replace without charge goods that petitioner has sold at special prices, or redeem coupons at an agreed rate (Pet. App. 4a; R. 64–67).

The evidence considered in the Commission proceedings related to transactions between the petitioner and five of its suppliers, only four of which participated in the coupon-book program. (The four participating suppliers were Burlington Industries, Inc., Cannon Mills Co., Tri-Valley Packing Ass'n, and the Idaho Canning Co.; Phillip Morris, Inc., was the non-participating supplier.) The Commission found that the first $350 paid to petitioner by each of the four participating suppliers was a promotional allowance within the meaning of Section 2(d), and that the additional benefits granted by these suppliers[2] in connection with the program were discriminatory price concessions within the purview of Section 2(a). It found

[2] A subsequent, separate proceeding against Cannon Mills was dismissed by the Commission for failure of proof of potential competitive injury (CCH Trade Reg. Rep., 1963–65 Transfer Binder ¶ 16,878). The hearing examiner, it should be noted, would have dismissed the case on the different ground that Cannon Mills could have cost justified the price concessions (CCH Trade Reg. Rep., 1963–65 Transfer Binder ¶ 16,682). The Commission thus did not rely in the court of appeals on the transactions between that supplier and petitioner as part of its case relating to the price-discrimination charge against petitioner. See Pet. App. 9a, n. 5.

that both Sections 2(d) and 2(a) had been violated since these suppliers had not granted the same promotional allowances and price concessions to other buyers of the same products who resold them in the Portland area; and that Section 2(d) had also been violated by Phillip Morris's granting petitioner promotional allowances, not connected with the coupon-book program, which were not available to two other buyers reselling in the same area (Pet. App. 6a–14a; R. 61–76; 100–103).

The buyers disfavored by Tri-Valley Packing and Idaho Canning and one of the two buyers disfavored by Phillip Morris were wholesalers who resold to retailers competing with petitioner. The Commission ruled that these disfavored wholesalers were protected under Section 2(d) from discriminatory promotional allowances in favor of petitioner even though petitioner was not a wholesaler but a direct-buying retailer (R. 85–93).

The Commission further found that petitioner (and its officers) had sufficient knowledge of the facts making illegal the discriminatory prices and payments it received to satisfy the knowledge requirements of Sections 2(f) and 5, including awareness that the price concessions could not be cost-justified by the suppliers despite the large quantities of goods purchased by petitioner (Pet. App. 20a–22a). The Commission relied on evidence showing that (1) none of the suppliers grants quantity discounts and petitioner itself pays the going amount except during the one-month period of the promotion, even though it buys substantially more than

its competitors; (2) the price concessions petitioner received from two of its suppliers, Tri-Valley and Idaho Canning, amounted to one-third of the price regularly charged by those suppliers; and (3) the cost savings resulting from differences in methods of sale or delivery were inconsequential (Pet. App. 20a–22a). The Commission also found that petitioner knew or should have known that the suppliers had not made the promotional allowances available to petitioner's competitors on proportionally equal terms. In this regard, it relied on evidence showing that (1) petitioner systematically gathered extensive information about its competitors' marketing activities (Pet. App. 26a), and (2) petitioner exerted pressure to induce its suppliers to grant the promotional allowances and to grant them exclusively to petitioner for the duration of the promotion (Pet. App. 19a–20a, 26a). The Commission reasoned that a buyer initiating a promotional program and inducing his suppliers to pay for participation in it possesses information sufficient to place upon the buyer the duty of inquiring whether the suppliers were making the allowances proportionally available to the buyer's competitors (Pet. App. 23a–24a). Thus, the Commission concluded, petitioner at least "had reason to know" that the concessions and allowances were discriminatory, and this was sufficient to support the findings of violation under Sections 2(f) and 5 (Pet. App. 26a–27a).

The Commission issued a two-part cease-and-desist order, which enjoined petitioner from knowingly in-

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ducing or receiving (1) any discriminatory price concessions (the Sections 2(a)–2(f) part), and (2) any discriminatory promotional allowances (the Sections 2(d)–5 part).

The Court of Appeals for the Ninth Circuit upheld the Commission's findings that petitioner had induced (1) price concessions which were illegal because they discriminated against other retail buyers and wholesale buyers, and (2) promotional allowances which were illegal because they were not made available to competing retail buyers. The court, however, reversed the Commission's ruling that petitioner acted illegally in inducing promotional allowances that were not made available to wholesale buyers who resell to retailers with whom petitioner competes (Pet. App. 18a).[3] It considered at length and specifically upheld the Commission's finding that petitioner knew or should have known of the unlawfulness of the payments it received (Pet. App. 19a–27a). In modifying the Commission's order, the court below limited the scope of the Sections 2(a)–2(f) part to coupon promotions or "any comparable scheme" (Pet. App. 34a), but left the scope of the Sections 2(d)–5 part substantially unchanged, although modifying the language somewhat. (Compare Pet. App. 35a and R. 57–58.)

[3] In No. 789, This Term, pending on petition for certiorari, the Commission is seeking review of this part of the decision by the court below. In addition, the Commission in that petition seeks review of one modification of the Commission's order of the court below which the Commission considers erroneous (see Pet. No. 789, 2, 14–15), but only if the Court grants review of the second question, also relating to the scope of the order, presented by petitioner in the instant case.

ARGUMENT

1. The court of appeals upheld, as supported by substantial evidence, the Commission's finding that petitioner (1) knowingly induced three of its suppliers, Burlington Industries, Tri-Valley Packing, and Idaho Canning, to give petitioner price concessions not made available to its competitors and therefore discriminatory and unlawful under Section 2(a) of the Robinson-Patman Act, and (2) knowingly induced three of its suppliers, Burlington Industries, Cannon Mills, and Phillip Morris, to give petitioner promotional allowances not made available to its competitors and therefore discriminatory and unlawful under Section 2(d) of the Act. Petitioner shows neither that the court of appeals misapprehended the proper standard for determining whether the Commission findings were supported by substantial evidence nor that the court misapplied that standard. See *Universal Camera Corp.* v. *National Labor Relations Board,* 340 U.S. 474, 491. There is thus no occasion for further review of the essentially factual issues here involved.

Petitioner argues that it could not have known that Burlington Mills provided it with illegal price discounts because petitioner bought in larger quantities from Burlington than did petitioner's competitors. Petitioner would naturally assume, so the argument goes, that the discounts that Burlington provided reflected the cost savings resulting from selling in volume and thus were lawful, as cost-justified, under Section 2(a). Both the court of appeals and the Commission properly rejected this

argument, however, by pointing out that petitioner knew that none of the suppliers granted quantity discounts and that petitioner itself paid the going rate eleven months of the year. Therefore, the evidence showed that petitioner at least had reason to know that the price discounts provided were not cost-justified.[4]

Petitioner also argues that the price discounts made available by Tri-Valley and Idaho Canning were not illegal under Section 2(a) of the Act, and, thus, in inducing these discounts, petitioner did not knowingly induce discriminatory price concessions. Petitioner bases this argument upon the theory that these suppliers sold at higher prices to wholesalers than to petitioner, but that since petitioner was a direct-buying *retailer*, it did not compete directly with such wholesalers. Petitioner's argument, in short, is simply that Section 2(a) forbids price discrimination only when it occurs between two firms competing at the same functional level. There is no merit to this contention, however, for it is well settled that a seller violates Section 2(a) when it discriminates against a wholesale buyer whose retail customers compete with the favored direct-buying retailer. *E.g., Federal Trade Commission* v. *Morton Salt Co.*, 334 U.S. 37. The Commission found that

[4] In addition, petitioner initiated and was the moving force behind the promotion (*supra*, pp. 4–5). Under such circumstances it had at least some duty to inquire about whether the concessions and allowances it induced are unlawful, and it can properly be charged with the knowledge which would have resulted from such an inquiry. *E.g., Giant Food Inc.* v. *Federal Trade Commission*, 307 F. 2d 184, 187 (C.A.D.C.), certiorari denied, 372 U.S. 910.

here the retail customers of the disfavored wholesalers competed with petitioner (R. 93–95).[5]

Finally, petitioner contends that one of the three suppliers that the court of appeals held provided it with illegal promotional allowances did not in fact do so. It claims that the allowances received from Cannon Mills were not unlawful under Section 2(d) because the discrimination did not injure competition, and, in any event, was cost-justified.[6] Petitioner's argument in this regard is without merit, however, for cost justification does not provide a defense to a Section 2(d) charge, and injury to competition is not a requirement for a Section 2(d) violation. *Federal Trade Commission* v. *Simplicity Pattern Co.*, 360 U.S. 55, 65.

Contrary to petitioner's assertions, the Commission and the court of appeals here adhered to and properly applied the teachings of this Court's decision in *Automatic Canteen Co.* v. *Federal Trade Commission*, 346 U.S. 61. In essence, *Automatic Canteen* held

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[5] Petitioner also challenges the Commission's determination that the price concessions granted by the three suppliers were likely to injure competition. The Commission found, however, that competition in the food industry is so keen that price differentials of as little as a few cents would shift some customers from one store to another, that the price concessions enabled petitioner to resell some of the goods at prices lower than the wholesalers *paid*, and that two of the items involved were the "fastest moving" in their respective lines and thus particularly significant in influencing consumer choices (Pet. App. 26a). These findings provide a sufficient basis for the Commission's determination. See *Federal Trade Commission* v. *Morton Salt Co.*, 344 U.S. 37; *Moog Industries* v. *Federal Trade Commission*, 238 F. 2d 43 (C.A. 8).

[6] See note 2, *supra*.

only that, in a proceeding in which a violation of Section 2(f) of the Robinson-Patman Act is charged, the burden is on the Commission to introduce evidence, as an initial matter, showing that the buyer knew that the price he induced was discriminatory and not otherwise justified, and that a mere showing that the buyer knew that the prices he was charged were lower than those paid by other purchasers is, standing alone, insufficient to carry this burden. Here the court below painstakingly considered the effect of *Automatic Canteen* under the instant circumstances (Pet. App. 19a–27a), and concluded that the evidence introduced provided a sufficient basis for the Commission's finding that petitioner knew or had reason to know that the concessions and allowances it received were unlawful. Petitioner actually is complaining that the evidence on the question of knowledge is not sufficiently substantial, not that the court below failed to follow *Automatic Canteen*. As discussed at length previously (*supra*, pp. 9–11), the factors relied on by the Commission and discussed by the court below (Pet. App. 21a), upon any fair consideration, show that petitioner had reason to know that the concessions it received were not cost-justified, and that it was "not an unsuspecting recipient of prohibited discriminations" (*Automatic Canteen Co., supra*, at 81). This is all that *Automatic Canteen* requires.

Petitioner not only mischaracterizes this Court's holding in *Automatic Canteen*, but also misconstrues the decision of the court below. Whatever its views on certain aspects of the evidence, the court below

held that substantial evidence supported the Commission's finding that petitioner knew or had reason to know that the concessions and allowances which it induced were unlawful (Pet. App. 26a–27a). In sum, the decision below follows prior cases in construing and applying *Automatic Canteen*, gives the "knowingly" requirement of Section 2(f) a balanced and sensible construction, and requires only that buyers make a reasonable effort to determine whether discriminatory concessions and allowances induced are cost-justified or otherwise not unlawful. Rather than presenting a conflict with *Automatic Canteen*, the analysis and holding of the court below are wholly consistent with the principles laid down by this Court in that case.

2. Petitioner also complains that a portion of the cease-and-desist order, as modified by the court below, is too broad insofar as it forbids petitioner to induce illegal promotional payments, not only in connection with any coupon promotion scheme, but also in connection with "any actual or purported promotion or special sale of particular products" (Pet. App. 35a). While this part of the order is broader than the part forbidding the inducing of illegal price discriminations, the evidence supporting it has wider scope. The illegal price discriminations here at issue were basically related to the coupon promotion scheme. But, certain of the discriminatory promotional allowances provided to petitioner—those involving Phillip Morris—had nothing to do with coupon promotions, but instead concerned various other types of promotional arrangements. Because the Section

2(d) violations were more extensive, the remedial order needed to be broader.

In any event, review of this part of the instant order, as modified and approved by the court below, is not warranted. In recent years this Court has frequently stressed the broad discretion which exists in framing and formulating orders where Robinson-Patman Act violations have been found. For example, in *Federal Trade Commission* v. *Ruberoid Co.*, 343 U.S. 470, 473, the Court stated:

> In carrying out this function [to prevent illegal practices in the future] the Commission is not limited to prohibiting the illegal practice in the precise form in which it is found to have existed in the past. * * * Moreover, "[t]he Commission has wide discretion in its choice of a remedy deemed adequate to cope with the unlawful practices" disclosed. *Jacob Siegel Co.* v. *Federal Trade Comm'n*, 327 U.S. 608, 611 (1946). Congress placed the primary responsibility for fashioning such orders upon the Commission, and Congress expected the Commission to exercise a special competence in formulating remedies to deal with problems in the general sphere of competitive practices. Therefore we have said that "the courts will not interfere except where the remedy selected has no reasonable relation to the unlawful practices found to exist." *Id.*, at 613.

See also *Federal Trade Commission* v. *National Lead Co.*, 352 U.S. 419, 428–429; *Federal Trade Commission* v. *Mandel Bros., Inc.*, 359 U.S. 385, 392–393.[7]

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[7] Nothing in this Court's decision in *Federal Trade Commission* v. *Henry Broch & Co.*, 368 U.S. 360, relied on by peti-

Here, particularly in light of the violations involving Phillip Morris (*supra*, p. 6), this part of the order is not so sweeping as to constitute an abuse of discretion; nor can the terms of the order be said to have "no reasonable relation to the unlawful practices found to exist."[8]

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tioner, is at all contrary to these decisions. In fact, in *Broch*, 368 U.S. at 364, the Court specifically relied on *Jacob Siegel Co.*, *supra*. Finding no merit in the argument that the Commission's order was too sweeping in its application to sales from *all* sellers to *all* buyers, the Court referred to the Commission's "wide discretion" in shaping its orders, and stated: "We cannot say that the Commission exceeded its discretion in banning repetitions of Broch's violation in connection with transactions involving *any* seller and buyer * * *" (368 U.S. at 364). Both the Commission and the court of appeals were quite aware of "the necessity for fashioning orders which are, at the outset, sufficiently clear and precise to avoid raising serious questions as to their meaning and application" (*id.* at 368), as required by this Court's opinion in *Broch*, and acted in conformity therewith in shaping and approving that part of the order here questioned. In contrast to *Swanee Paper Corp.* v. *Federal Trade Commission*, 291 F. 2d 833 (C.A. 2), certiorari denied, 368 U.S. 987, this is not a case where there is no "relation between the facts found and the breadth of the order" (291 F. 2d at 837); nor is petitioner here enjoined "from violating Section 2(d) in the very words of the statute" (*id.* at 838); compare *Joseph A. Kaplan & Sons, Inc.* v. *Federal Trade Commission*, 347 F. 2d 785, 789 (C.A.D.C.).

[8] This is not a situation in which the court of appeals simply approved the Commission's order *in toto* and reviewed the terms of that order only in a perfunctory manner. Indeed, the court below scrutinized the Commission's order carefully and modified it in certain significant respects (Pet. App. 28a–32a).

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted.

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